

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Fresno
(County File No. 017-ACP-FRE-05/06)

Administrative Docket No. 136

DECISION

Robert Cantrell
JP-08663
238 Ida Way
Hanford, California 93230

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and California Code of Regulations (CCR), title 3, section 6130, county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing on July 13, 2006, the Fresno CAC found that on September 29, 2005, the appellant, Robert Cantrell, a licensed aerial applicator, committed one violation of the State's pesticide laws and regulations pertaining to Food and Agricultural Code section 12973 and would be fined \$700.00.

Robert Cantrell appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have

been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

Factual Background

On September 29, 2005, licensed pilot Robert Cantrell applied the pesticides Folex 6 EC (an organophosphate pesticide) and Cottonquik by airplane to a cotton field for the purpose of defoliating the cotton plants. The field was located on Terranova Ranch in Helm, California. Tractor driver Daniel Lopez was driving an open cab tractor with an attached water tanker on a dirt road west of the application. Mr. Lopez was spraying water on the roads to control dust. Mr. Lopez was approximately 250 feet from the aerial application, on a dirt road between a grape field and an alfalfa field, when he saw spray mist from the application moving toward him and felt the mist hit his face and neck. Mr. Lopez returned to the shop, removed his work clothes, took a shower and was transported to a medical center for treatment. The doctor determined Mr. Lopez experienced a minimal pesticide exposure and diagnosed chemical burns on his eyelids. The only treatment administered was providing Mr. Lopez with eye drops. The CAC sent the hat and coveralls Mr. Lopez was wearing to the California Department of Food and Agriculture lab for analysis. Both items tested positive for the presence of Folex.

Relevant Statute and Regulation

FAC section 12973 reads as follows: "The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner."

When levying fines, the CAC must follow the fine guidelines in CCR, title 3, section 6130. Under section 6130, violations shall be designated as "Class A," "Class B," and "Class C." A "Class A" violation is one which created an actual health or environmental hazard; is a violation of a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897; or is a violation that is a repeat Class B violation. The fine range for Class A violations is \$700-\$5,000. A "Class B" violation is one that posed a reasonable possibility of creating a health or environmental effect, or is a violation that is a repeat Class C violation. The fine range for Class B violations is \$250-\$1,000. A "Class C" violation is one that is not defined in either Class A or Class B. The fine range for Class C violations is \$50-\$400.

Appellant's Allegations

The Appellant asserts that Mr. Lopez was not sprayed and may have purposely walked into the treated field to contaminate himself. Appellant asserts that Mr. Lopez's motivation was to get time off work or to obtain compensation. Mr. Cantrell asserts that Mr. Lopez's testimony is generally inconsistent but particularly with regard to wind direction and direction of travel, and he is not to be believed. Mr. Cantrell asserts that if Mr. Lopez was sprayed, the surrounding fields of alfalfa and grapes would also have been sprayed and would have been damaged by the application. Mr. Cantrell argues that photographs taken twelve days later of the adjacent fields show no damage and prove Mr. Lopez was not sprayed. He also asserts that if the CAC would have taken swab samples of the tractor and samples of vegetation in the adjacent fields, as he and his employer requested, those samples would have been negative and would demonstrate Mr. Lopez was not sprayed. Lastly, Mr. Cantrell argues that the manner in which he sprayed the cotton field would have prevented any drift to non-target areas.

The Hearing Officer's Decision

The Hearing Officer found that the appellant violated FAC 12973 because the pesticide labels of Folex and Cottonquik both carry directions for use that state "do not apply this product in a way that will contact workers or other persons, either directly or through drift", and appellant's application of the pesticides drifted on tractor driver Lopez. The Hearing Officer determined that Mr. Lopez was sprayed based on Mr. Lopez' testimony that he felt spray mist on his face; his testimony regarding his symptoms that was consistent with symptoms listed on the material safety data sheets of the two pesticides; the medical records that show the doctor's diagnosis is consistent with pesticide poisoning; and the positive lab analysis that found Folex Mr. Lopez's clothing.

The Director's Analysis

The Hearing Officer did not make any specific findings regarding the credibility of the witnesses. However, because the Hearing Officer indicated that one basis of his decision is Mr. Lopez's testimony, the Director can infer that the Hearing Officer found Mr. Lopez credible. Of concern to the Director is the fact that the translation of Mr. Lopez's testimony during the hearing was not verbatim. There was discussion between the translator and Mr. Lopez, in Spanish, that was not translated into English on the record. The translator explained things to Mr. Lopez, and discussed things with him to obtain more specific answers to the questions asked without explaining the exchange in English for the parties or the record.¹ Mr. Cantrell asserts

¹ For example, Mr. Lopez was asked to estimate wind direction. When he could not recall, the translator asked him if the wind was less than five miles per hour. The person attempting to solicit the testimony did not ask this question

that Mr. Lopez's testimony was inconsistent and not to be believed. It was clear from the recording of the hearing that Mr. Lopez could not identify directions of travel (north, south, east or west) or wind speeds and the questioning confused him. However, Mr. Lopez never deviated from his testimony that he was sprayed. In addition, Mr. Lopez never deviated from his assertion that he (1) did not get off his tractor; and, (2) purposely walk into the treated field in order to become contaminated.

The medical records show that the degree of Mr. Lopez's injuries did not result in time lost from work; therefore, Mr. Cantrell's assertion that Mr. Lopez faked the poisoning for a few days off work or for compensation is not supported by the record. The medical records, even though stating a diagnosis of chemical burns of the eyelids, note that pesticide exposure appeared to be minimal and that Mr. Lopez had no toxic symptoms. The records note mild erythema on the face but within normal limits. The records also state that Mr. Lopez denies coughing, respiratory difficulties, excessive sweating or excessive salivation, which are all symptoms of poisoning from an organophosphate pesticide as contained on the Folex label. At the hearing, Mr. Lopez testified that the doctor's examination was very brief and consisted of the doctor tapping on his back. Mr. Lopez also testified that his eyes still burned, he still had headaches and he was still vomiting. The pesticides used were both Category I: very toxic and corrosive pesticides. The pesticide labels indicate that both pesticides cause irreversible eye damage, and are very harmful if inhaled. The material safety data sheets also caution against the severe health effects that result from exposure to these pesticides. There was no evidence in the record to explain what level of exposure would cause severe health effects or what level of health effects could be expected from the level of pesticide residue found on Mr. Lopez's clothing. Mr. Lopez's testimony at hearing of continued health effects almost ten months later appears surprising given the medical assessment of minimal exposure made immediately after the event. The label and MSDS of these pesticides creates an expectation of a resulting and severe health effect immediately after exposure to the pesticides that is not supported by the record. The Director finds that the medical evidence is somewhat inconsistent with the MSDS, labels and Mr. Lopez's testimony.

From the testimony of Mr. Lopez, Mr. Cantrell, and the CAC inspector, Sue Logoluso, it is evident that for Mr. Lopez to have been sprayed at his location, the pesticides would have had to have drifted across the corner of the adjacent alfalfa field and the corner of a grape vineyard. Mr. Cantrell and Mr. Grouleff (Mr. Cantrell's employer) both testified that if this were true, the alfalfa field and the grapes would show damage. The photographs taken twelve days after the application, on October 11, 2005, offered at hearing by Mr. Grouleff, do not appear to demonstrate any damage to the adjoining crops. However, the labels of the two pesticides do not say damage *will* occur, but caution that changes in plant growth could occur (Cottonquik) or defoliation or damage to non-target crops may occur (Folex). The photographs offered by Mr. Grouleff do indicate that the plants in the cotton field were experiencing defoliation, right up to

and the exchange was not translated in English for the record.

the tip of the triangle of cotton that adjoined two fields of alfalfa. Due to the very narrow north end of the field, it would appear very difficult to have sprayed a pesticide from an airplane to the very edge of the cotton field and not spray the corners of the adjoining fields. In any case, the application would be very close to where Mr. Lopez indicated he was located.

Mr. Grouleff and Mr. Cantrell testified that they contacted the CAC on September 29, 2005, asserted that the drift incident did not happen, and asked the CAC to obtain swabs from the tractor and the fields to prove that the tractor driver was not sprayed. The CAC decided not to do so, but obtained Mr. Lopez's clothing instead. The CAC gave a plausible explanation that swabbing the tractor would not have yielded helpful evidence because the tractor is so mobile and could be exposed to many pesticides in its travels. However, no explanation was given as to why samples were not taken from the alfalfa field and grape vineyard located between the application and Mr. Lopez's location.

Testimony at hearing estimated that wind speeds were approximately ten miles per hour out of the east, which is consistent with the spray mist moving toward Mr. Lopez's position.

Mr. Lopez's clothing tested positive for Folex. However, there is some concern about the chain of custody and possible contamination from other sources. Mr. Lopez testified that he took his hat and coveralls off and put them on a chair. He then took a shower. He testified that he then put the clothes in a plastic bag and that the clothes were placed in the trunk of his car. The CAC inspector testified that she went to Terranova to retrieve Mr. Lopez's clothes but he was not there and neither were the clothes. She waited for him to return from the medical clinic and asked him where the clothes were. He took her to the car and opened the trunk. She put on gloves, picked up the clothes and placed them in a paper bag. She did not recall removing the clothes from a plastic bag or a duffle bag. Mr. Lopez testified that he takes his coveralls home everyday and washes the clothes once a week for the following week. It could be inferred that he places daily soiled coveralls in his trunk for washing on the weekend.

The evidence discussed above raises some concerns that support appellant's argument. However, the Director's review of the CAC's decision is limited to a determination of whether the decision is supported by substantial evidence. The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision.

Mr. Lopez testified that he was sprayed. The medical record contains a diagnosis of chemical burns on his eyelids. The laboratory analysis indicates that his hat and coveralls were

contaminated by Folex. The cotton field was defoliated right up to the very edge and the wind speed at the time of the application was approximately ten miles per hour out of the east toward Mr. Lopez's position. The pesticide labels require that the two products be applied in a manner to avoid spraying or drifting on persons not involved in the application. While there are some concerns about the evidence, viewing this evidence in the light most favorable to the CAC's decision results in the finding that substantial evidence is found in the record to support the Hearing Officer's decision that Mr. Cantrell violated FAC 12973 and supports the CAC's order. Mr. Lopez's testimony and the medical record support a finding that an actual health hazard resulted from the violation so that a Class A fine is justified. The low range of the fine of \$700 is well within the CAC's discretion.

Conclusion

The commissioner's decision that Robert Cantrell violated FAC section 12973 is supported by substantial evidence. The commissioner's decision to levy a fine of \$700.00 is also supported by substantial evidence.

Disposition

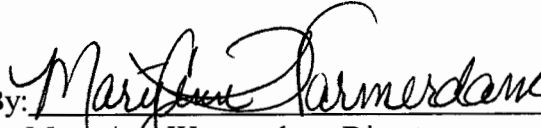
The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$700 fine.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION

NOV 15 2006
Dated: _____

By: 
Mary-Ann Warmerdam, Director